

The Moon Court, Land Use, and Property: A Survey of Hawai‘i Case Law 1993-2010

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I. INTRODUCTION

The buying, selling, and regulation of interests in property has generated as much litigation in Hawai‘i over the past two decades as it had in the previous forty years. Little of economic consequence occurs in the state without affecting land.¹ As a result, although Hawai‘i remains on the whole non-litigious, legal disputes about land continue to arise, often raising fundamental constitutional issues, but also frequently dealing with the mundane. Into the first category fall disputes concerning property taken under the state’s power of eminent domain (triggering constitutional analyses on public use, compensation, and regulatory takings) and state constitutional guarantees of Native Hawaiian traditional and customary rights; into the second category fall condominium or homeowner association disputes.

In deciding the dozens of cases in these categories, the state supreme court over which retired Chief Justice Moon presided rendered decisions in which some trends are readily discernible. First, the court resumed a practice arguably commenced during the Richardson years (but interrupted during the Lum Court)² of deciding a handful of important cases on grounds neither briefed nor argued by the parties. The Richardson Court did so in both *Robinson v. Ariyoshi*³ and (arguably) *County of Kauai v. Pacific Standard Life Insurance Co. (Nukoli)*,⁴ while the Moon court did so in *Public Access Shoreline Hawaii*

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¹ See generally DAVID L. CALLIES, *REGULATING PARADISE* (2d ed. 2010); DAVID KIMO FRANKEL, *PROTECTING PARADISE: A CITIZEN’S GUIDE TO LAND & WATER USE CONTROLS IN HAWAII* (1997).

² See David L. Callies, Donna H. Kalama & Mahilani E. Kellett, *The Lum Court, Land Use, and the Environment: A Survey of Hawai‘i Case Law 1983 to 1991*, 14 U. HAW. L. REV. 119 (1992).

³ 65 Haw. 641, 658 P.2d 287 (1982).

⁴ 65 Haw. 318, 653 P.2d 766 (1982).

v. Hawai'i County Planning Commission (PASH).⁵ In at least two such cases, the court denied motions for rehearing so the parties could brief and argue issues presented by that new ground. Second, the Moon Court decided some of the state's most important property and related environmental and Native Hawaiian rights cases in favor of the various non-governmental organizations bringing them (Sierra Club, Earthjustice, Hawaii's Thousand Friends, and the Native Hawaiian Legal Corporation) approximately eighty-two percent of the time,⁶ sixty-five percent of which reversed the Intermediate Court of Appeals

⁵ 79 Haw. 425, 903 P.2d 1246 (1995).

⁶ This percentage was calculated from important land use and property cases, in which there was a clear interest by either a developer or environmental group. *See* Maunalua Bay Beach Ohana 28 v. State, No. 28175, 2010 WL 2329366, 2010 Haw. LEXIS 119 (June 9, 2010) (denying certiorari to private landowners' inverse condemnation claim for the loss of a property interest in existing accretions to shoreline property); *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 231 P.3d 423 (2010) (holding that the timing of development could constitute a substantial change requiring a new environmental impact statement); *Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc.*, 121 Haw. 16, 211 P.3d 74 (2009) (holding that a beach equipment rental store was not a valid prior nonconforming use); *Sierra Club v. Dep't of Transp. (Superferry II)*, 120 Haw. 181, 202 P.3d 1226 (2009) (holding that a special session act authorizing immediate commencement of an interisland ferry was unconstitutional); *Cnty. of Hawai'i v. C & J Coupe Family Ltd. P'ship (Coupe I)*, 119 Haw. 352, 198 P.3d 615 (2008) (holding that a bypass road did not qualify as a public purpose and that the county impermissibly used its eminent domain authority); *Brescia v. N. Shore Ohana*, 115 Haw. 477, 168 P.3d 929 (2007) (holding the larger shoreline setback applicable); *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006) (holding that the trial court erred in finding that the developers breached their public trust duty to protect waters adjacent to the property); *Leslie v. Bd. of Appeals*, 109 Haw. 384, 126 P.3d 1071 (2006) (holding that a Special Management Area (SMA) permit must be obtained prior to tentative subdivision approval); *Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1098 (2006) (holding that a district boundary amendment triggered the requirement for an environmental assessment); *Kepo'o v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005) (holding that the lease of state lands for a power plant was a use of state lands requiring an environmental impact statement); *Morimoto v. Bd. of Land & Natural Res.*, 107 Haw. 296, 113 P.3d 172 (2005) (holding that the Board of Land and Natural Resources could approve mitigation measures to upgrade a state road); *T-Mobile USA, Inc. v. Cnty. of Hawai'i Planning Comm'n*, 106 Haw. 343, 104 P.3d 930 (2005) (holding that a concealed cellular telephone tower and equipment building were permitted uses in the agricultural district); *Bremer v. Weeks*, 104 Haw. 43, 85 P.3d 150 (2004) (reversing the lower court and finding evidence of ancient or historic use of a trail); *Morgan v. Planning Dep't*, 104 Haw. 173, 86 P.3d 982 (2004) (holding that the planning commission had the authority to amend a condition of an approved SMA permit); *Haw. Elec. Light Co. v. Dep't of Land & Natural Res.*, 102 Haw. 257, 75 P.3d 160 (2003) (holding that the Board of Land and Natural Resources denial of a conditional use permit was invalid because there were insufficient votes to support the action); *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, 94 Haw. 31, 7 P.3d 1068 (2000) (holding that the Land Use Commission failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected to the extent feasible); *Curtis v. Bd. of Appeals*, 90 Haw. 384, 978 P.2d 822 (1999) (holding that Hawai'i Revised Statutes section 205-4.5(a) did not permit cellular telephone towers as of

(ICA).⁷ Third, the court increasingly rendered lengthy opinions,⁸ many triple the length of those from the Lum Court and often describing the context in which the case arose procedurally even when the process was not an issue. That said, the court certainly set a high bar for thoroughness and explanatory analysis. For example, its decision in *Save Sunset Beach Coalition v. City & County of Honolulu*⁹ is a model of clarity and organization reminiscent of the style of opinions written by retired ICA Judge Walter Heen¹⁰ and retired ICA Chief Judge James Burns.¹¹

The court continued a trend of the Lum Court¹² in two cases reinforcing the importance of plans and planning to our system of land use regulation. Noting that plans have the force of law in Hawai'i,¹³ the court held that in the event of conflict between plans and other land use controls, such as zoning, the most

right); *Young v. Planning Comm'n*, 89 Haw. 400, 974 P.2d 40 (1999) (holding that the use of larger vessels in conjunction with a tour operation required an SMA use permit); *GATRI v. Blane*, 88 Haw. 108, 962 P.2d 367 (1998) (holding that in the coastal zone, the more restrictive use specified in the county zoning or general plan controls); *Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (PASH)*, 79 Haw. 425, 903 P.2d 1246 (1995) (holding that the planning commission has an obligation to protect Native Hawaiian rights to the extent reasonable when issuing a SMA use permit); *Mauna Kea Power Co. v. Bd. of Land & Natural Res.*, 76 Haw. 259, 874 P.2d 1084 (1994) (holding that the ex parte communication of some members of the Board of Land and Natural Resources did not deny due process of law to the developer); *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 75 Haw. 237, 858 P.2d 726 (1993) (holding that a proposed demolition of structures in a county park would have a significant environmental impact that required an SMA use permit).

⁷ Cases in which the Moon Court reversed the ICA include: *Brescia*, 115 Haw. 477, 168 P.3d 929; *Coupe I*, 119 Haw. 352, 198 P.3d 615; *GATRI*, 88 Haw. 108, 962 P.2d 367; *Hawaii's Thousand Friends*, 75 Haw. 237, 858 P.2d 726; *Ka Pa'akai O Ka 'Aina*, 94 Haw. 31, 7 P.3d 1068; *Morgan*, 104 Haw. 173, 86 P.3d 982; *Save Diamond Head Waters LLC*, 121 Haw. 16, 211 P.3d 74; *Superferry II*, 120 Haw. 181, 202 P.3d 1226; *Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1098; and *Turtle Bay*, 123 Haw. 150, 231 P.3d 423.

The cases in which the Moon Court affirmed the ICA include: *Curtis*, 90 Haw. 384, 978 P.2d 822; *Kepo 'o*, 106 Haw. 270, 103 P.3d 939; *Leslie*, 109 Haw. 384, 126 P.3d 1071; *Mauna Kea Power Co.*, 76 Haw. 259, 874 P.2d 1084; *PASH*, 79 Haw. 425, 903 P.2d 1246; and *Young*, 89 Haw. 400, 974 P.2d 40.

⁸ *E.g.*, *PASH*, 79 Haw. 425, 903 P.2d 1246; *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 87 Haw. 217, 953 P.2d 1315 (1998); *In re Water Use Permit Applications (Waiāhole I)*, 94 Haw. 97, 9 P.3d 409 (2000); *Save Sunset Beach Coal. v. City & Cnty. of Honolulu (Sunset Beach)*, 102 Haw. 465, 78 P.3d 1 (2003); *Turtle Bay*, 123 Haw. 150, 231 P.3d 423.

⁹ 102 Haw. 465, 78 P.3d 1.

¹⁰ *See, e.g.*, *Topliss v. Planning Comm'n*, 9 Haw. App. 377, 842 P.2d 648 (1993).

¹¹ *See, e.g.*, *Whitesell v. Houlton*, 2 Haw. App. 365, 632 P.2d 1077 (1981). Noted particularly for its incisive brevity, the case is widely cited elsewhere in the United States, demonstrating that an opinion need not be exhaustive or voluminous to be a respected landmark.

¹² *See Lum Yip Kee, Ltd. v. City & Cnty. of Honolulu*, 70 Haw. 179, 767 P.2d 815 (1989).

¹³ *GATRI v. Blane*, 88 Haw. 108, 114, 962 P.2d 367, 373 (1998).

restrictive in terms of permitted uses will control.¹⁴ The court also continued a trend that is appropriately harsh on landowners who knowingly violate land use controls, whether public or private, particularly height covenants.¹⁵ The court thus required a Buddhist temple to remove a section of its roof that exceeded local bulk zoning height standards, denying an after-the-fact variance.¹⁶ However, the court continued to rigorously examine the language of covenants,¹⁷ holding that in the event of ambiguity, the dispute would be resolved against restriction and in favor of the free use of land.¹⁸

Turning to coastal zone law, the Moon Court continued to decide cases in favor of coastal zone protection. In one case, the court disallowed an attempt by Honolulu's Department of Parks and Recreation to "piecemeal" a project in order to avoid obtaining a Special Management Area (SMA) permit.¹⁹ In another, the court held that in a coastal zone, a restrictive plan trumped a less restrictive zoning ordinance.²⁰ Finally, the court continued to expand standing, holding that a Native Hawaiian group with no nearby property interest could intervene in an SMA permit hearing.²¹ The court also virtually rewrote the state environmental impact statement (EIS) law to protect coastal resources at Turtle Bay.²²

The court continued the expansion of Native Hawaiian rights to both land and water at the expense of landowners. It reinforced the exercise of traditional and customary rights guaranteed by the state constitution,²³ but did so as to virtually all land not fully developed, thereby gratuitously launching a direct

¹⁴ *Sunset Beach*, 102 Haw. 465, 78 P.3d 1.

¹⁵ *E.g.*, *Sandstrom v. Larsen*, 59 Haw. 491, 583 P.2d 971 (1978) (requiring a homeowner to remove the top story of his home because it violated a restrictive height covenant on the property); *see also Pelosi v. Wailea Ranch Estates*, 91 Haw. 478, 985 P.2d 1045 (1999) (establishing a "balancing of the equities" test for enforcing restrictive covenants against innocent successors to original covenantors).

¹⁶ *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 87 Haw. 217, 953 P.2d 1315 (1998).

¹⁷ *See Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd.*, 75 Haw. 370, 376-77, 862 P.2d 1048, 1054-55 (1993). This case straddled the transition from the Lum Court to the Moon Court. Originally heard by the Lum Court, with Chief Justice Lum recused, the case was decided on November 19, 1993 by the Moon Court.

¹⁸ *Hiner v. Hoffman*, 90 Haw. 188, 977 P.2d 878 (1999).

¹⁹ *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 75 Haw. 237, 858 P.2d 726 (1993).

²⁰ *GATRI v. Blane*, 88 Haw. 108, 962 P.2d 367 (1998).

²¹ *Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (PASH)*, 79 Haw. 425, 903 P.2d 1246 (1995).

²² *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 231 P.3d 423 (2010).

²³ *See Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982). *Kalipi* is the Richardson Court's seminal opinion on traditional and customary rights.

attack on “western concepts” of property like the concept of fee simple.²⁴ While the court later retreated from its original sweeping language,²⁵ one suspects that the near-unanimous and hostile reception of Moon Court decisions by the U.S. Supreme Court in, for example, *Hawaii v. Office of Hawaiian Affairs*²⁶ is probably somewhat due to such stances, which vary from the language in earlier U.S. Supreme Court decisions.²⁷

In the area of water rights, the court ignored both statute and plans in elevating the rights of Native Hawaiians over commercial agricultural uses, largely through a breathtakingly expansive definition and use of the public trust doctrine,²⁸ reminiscent of the Richardson Court in *Robinson v. Ariyoshi*.²⁹ The court in *Robinson* prompted even the Ninth Circuit to wring its collective hands for years before finally conceding that Hawai‘i could define its property and land use laws so long as it compensates under the U.S. Constitution’s Fifth Amendment for the taking of any property rights thereby.

The court expanded the rights of private landowners in the event of a physical taking by eminent domain: the defense of pretextuality—appearing only in a concurrence in the now-infamous *Kelo v. City of New London*³⁰—must be considered virtually whenever raised even if the condemnation is for the universally accepted public use of constructing a public road.³¹ Because pretextuality has rarely arisen in reported cases, and then only in public *purpose* (not public *use*) cases involving economic revitalization,³² the decision can only be described as an anomaly.

Finally, for the rest—easements and condominiums—the court encountered generally mundane factual situations, but still set forth useful, if not remarkable, opinions.

²⁴ *PASH*, 79 Haw. at 447, 903 P.2d at 1268. This is a concept close to the heart of the U.S. Supreme Court. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (holding that a land use regulation that strips a landowner of “all economically beneficial use” constitutes a taking requiring compensation unless the regulation codifies a nuisance or is part of a state’s “background principles” of its law of property, such as customary or public trust law).

²⁵ *State v. Hanapi*, 89 Haw. 177, 970 P.2d 485 (1998).

²⁶ 556 U.S. 163 (2009).

²⁷ See *Lucas*, 505 U.S. 1003.

²⁸ *Waiāhole I*, 94 Haw. 97, 9 P.3d 409 (2000).

²⁹ 65 Haw. 641, 658 P.2d 287 (1982).

³⁰ 545 U.S. 469, 490-93 (Kennedy, J., concurring).

³¹ *Coupe I*, 119 Haw. 352, 198 P.3d 615 (2008), *modified by* Cnty. of Hawai‘i v. C & J Coupe Family Ltd. P’ship (*Coupe III*), 124 Haw. 281, 242 P.3d 1136 (2010).

³² 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123, 1125 (C.D. Cal. 2001).

II. PLANNING AND ZONING

One of the Moon Court's most significant land use law decisions was its expansion of environmental review requirements in *Unite Here! Local 5 v. City and County of Honolulu (Turtle Bay)*.³³ The significance of the opinion is especially apparent given that Hawai'i's land use regulatory scheme is already the most restrictive and complex in the country.³⁴

With state and local governments often involved "in excruciating detail[.]" nearly all development is "complex, lengthy, expensive, and very often uncertain."³⁵ While some of the difficulties of developing land in Hawai'i go with the territory,³⁶ some of the Moon Court's decisions—including *Turtle Bay*—have only added to Hawai'i's reputation for hostility to economic development.³⁷ Consistent with the Moon Court's general trend toward lengthening the environmental review process,³⁸ *Turtle Bay*'s significance

³³ 123 Haw. 150, 231 P.3d 423 (2010).

³⁴ CALLIES, *supra* note 1, at 1. Hawai'i has a state-level land district classification system in addition to county zoning schemes. *Id.* At the state level, all land in Hawai'i is divided into four districts: urban, rural, agricultural, and conservation. *Id.* With forty-eight percent of the state's land designated conservation and forty-seven percent designated agricultural, much development requires costly and reclassification at the state level into the urban (currently five percent of state land) or rural (less than half a percent) districts. *Id.* at 21-22 (citing STATE OF HAW., DEP'T OF BUS., ECON. DEV. & TOURISM, STATE OF HAWAII DATA BOOK 2009 (2010), available at <http://hawaii.gov/dbedt/info/economic/databook/db2009/section06.pdf> (with data current as of Dec. 31, 2006)).

³⁵ Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. HAW. L. REV. 17, 17 (2004). The article notes the problems with developing land in Hawai'i and examines vested rights and zoning estoppel as a "measure of certainty in an otherwise uncertain process and attempt to minimize the risk that the rug can be pulled out unexpectedly from a property owner after the government has given the green light to a use and the owner has started down the path in reliance." *Id.* at 63.

³⁶ The discovery of Native Hawaiian burials, for example, halts construction and triggers special procedures. *See, e.g.*, HAW. REV. STAT. § 6E-43.6 (2009) (governing procedure after inadvertent discovery of burial sites); *see generally* CALLIES, *supra* note 1, at 280-86.

³⁷ *See, e.g.*, Jay Fidell, *Labyrinthine Land-Use Laws Suffocating Isle Economy*, HONOLULU STAR-ADVERTISER, Mar. 1, 2011, available at http://www.staradvertiser.com/business/20110301_Labyrinthine_land-use_laws_suffocating_isle_economy.html.

³⁸ *See, e.g.*, *Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1098 (2006). In *Sierra Club*, the court held that the requirement under Hawai'i Revised Statutes section 343-5 that an environmental assessment be prepared at the earliest practical time also pertains to a district boundary amendment (DBA). This result, however, runs contrary to the nature of the DBA, which "provides a landowner with considerable discretion in future uses of the land making it often impossible to so much as speculate about [its] the effects." CALLIES, *supra* note 1, at 30.

stems from the uncertainty it adds to Hawai‘i’s land use regulatory scheme and the decision’s potential to disrupt development.³⁹

The Moon Court also considered a number of zoning cases, such as the scope of the Director of the Honolulu Department of Planning and Permitting’s (DPP) authority to respond to zoning violations and withhold declaratory orders and variances. In *Save Sunset Beach Coalition v. City & County of Honolulu (Sunset Beach)*,⁴⁰ the court held that a zoning map amendment is unequivocally a legislative act and that in the event of a contradiction between a zoning designation and a development plan, the more restrictive measure controls.⁴¹

A. Supplemental Environmental Review

Litigation in *Turtle Bay* involved the proposed expansion of the Turtle Bay Resort, a project traceable to the 1980s and delayed largely due to Hawai‘i’s economic downturn during the 1990s.⁴² The project’s environmental impact statement (EIS) was prepared pursuant to the Hawai‘i Environmental Policy Act (HEPA)⁴³ and originally accepted by the Department of Land Utilization⁴⁴ in 1985.⁴⁵ The question before the Moon Court was whether the developer’s

³⁹ As argued by the developer on appeal, the *Turtle Bay* ruling provides anyone the “legal authority under the SEIS Rules to challenge [any] developments that are outside of the time frame analyzed in its EIS . . . regardless of the depth and breadth of other reviews of project impact, or other state and federal laws governing and protecting the area.” Kuilima Resort Company’s Motion for Reconsideration at 21, *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 231 P.3d 423 (2010) (No. 28602), available at <http://www.inversecondemnation.com/files/kuilimarecon.pdf>.

⁴⁰ 102 Haw. 465, 78 P.3d 1 (2003).

⁴¹ *Id.* at 482, 78 P.3d at 18 (“Because the uses allowed in country zoning[] are prohibited from conflicting with the uses allowed in a State agriculture district, only a more restricted use as between the two is authorized.”).

⁴² See UNIV. OF HAW., ENVIRONMENTAL IMPACT STATEMENT FOR WAIALEE LIVESTOCK RESEARCH CENTER 24 (July 24, 1980), available at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/1980s/1980-07-OA-EIS-Waiale-Livestock-Research-Center.pdf (noting that Kuilima’s 20-year development plan was known of by 1980).

⁴³ HEPA is designed to provide environmental impact information only, and does not obligate the government or its agencies to act upon that information. Not all actions affecting the environment “trigger” an EIS. The statute lists those that do, like proposed development on state land, or changing the state designation of conservation land to a less protective classification.

⁴⁴ The Department of Planning and Permitting is the Department of Land Utilization’s successor agency. Note the operative language is “accepted” and not “approved.” It is not a discretionary act. The sole question for an “accepting” agency is whether the EIS complies with a statutory checklist.

⁴⁵ *Unite Here! Local 5 v. City & Cnty. of Honolulu (Turtle Bay)*, 123 Haw. 150, 154, 231 P.3d 423, 427 (2010).

subsequent application for subdivision approval, filed in 2005, triggered a requirement to file a supplemental EIS (SEIS).⁴⁶ The Hawai'i Supreme Court ultimately reversed the circuit court and the ICA, both of which had held that an SEIS was not required. The court's opinion, by Chief Justice Moon, substantially expanded the ability of development opponents to challenge the sufficiency of an accepted EIS and delay or derail projects altogether.

After rejecting Kuilima's arguments that the statute of limitations had run and that the Environmental Council lacked the authority to promulgate HEPA rules, the court considered the threshold issue of when an SEIS is required under HEPA regulations.⁴⁷ However, instead of clearly stating when an SEIS is required,⁴⁸ the court held that because it found a substantive change in the timing of the project, together with changes extrinsic to the project, the next step would be to consider whether the change "may have a significant effect."⁴⁹ In so holding, the court significantly expanded the type of change, here the timing of development, that could qualify as "substantial."⁵⁰ Thus, every EIS is now subject to a timing condition.

Having found a "substantial change" to the project, the court proceeded to consider whether the change in timing "may have a significant effect" on the environment.⁵¹ However, the court set a low bar for the fulfillment of the "significant effect" requirement under HEPA, reasoning that the "plaintiffs 'need not show that significant effects will in fact occur' but instead need only 'raise[] substantial questions whether a project may have a significant effect[]'."⁵² The court ultimately held that this case "clearly 'raises substantial questions[]' . . . regarding changes in the project area and its impact on the surrounding communities."⁵³

The court specifically considered the issue of traffic impacts, finding that "the Kuilima expansion project [would] result in traffic impacts that were not contemplated by the 1985 EIS, which predicted impacts only through the year

⁴⁶ *Id.* at 159, 231 P.3d at 432.

⁴⁷ *Id.* at 171-77, 231 P.3d at 444-50.

⁴⁸ See Emily E. Klatt, *Traffic, Turtles, and Public Controversy: The Hawaii Environmental Policy Act and Supplemental Environmental Review 23* (May 2010) (unpublished J.D. thesis, Univ. of Haw.) (on file with co-author Klatt) (arguing that the court should have clarified the law on this issue).

⁴⁹ *Turtle Bay*, 123 Haw. at 178, 231 P.3d at 451 (quoting HAW. CODE R. § 11-200-26 (1996)).

⁵⁰ *Id.* at 177, 231 P.3d at 450.

⁵¹ *Id.* at 178, 231 P.3d at 451.

⁵² *Id.* (quoting *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006)) (emphasis omitted). Co-author Klatt argues that this standard is too low of a burden to determine whether an SEIS is warranted. See Klatt, *supra* note 48, at 29.

⁵³ *Turtle Bay*, 123 Haw. at 178, 231 P.3d at 451 (citations omitted).

2000.”⁵⁴ According to the court, although the traffic impact created by the project itself had not changed, the mere fact that traffic levels have increased since 1985 was sufficient to raise substantial questions about significant effect and thereby necessitate an SEIS.⁵⁵ Under such a relaxed standard, virtually any change could establish a new impact. Take, for example, the plaintiff’s argument that there may be an increased impact to endangered and threatened species, such as the monk seal and green sea turtle.⁵⁶ The court found that post-1985 reports on the monk seals and green sea turtles “clearly qualif[y] as ‘new’ information or circumstances that were ‘not originally disclosed,’ not previously considered, and could have a substantial effect on the environment.”⁵⁷ Finding a “substantial effect,” the court reversed the ICA and required that Kuilima file an SEIS.

The Moon Court’s decision in *Turtle Bay* both construes the requirement to process an SEIS broadly and lowers the burden of those alleging a HEPA violation. Large-scale development, particularly in the State of Hawai‘i, often spans lengthy timelines⁵⁸ and is particularly vulnerable to renewed scrutiny of an accepted EIS. The result in *Turtle Bay* undermines finality in the SEIS process, making it a potent tool to halt development otherwise fully approved. Regrettably, this is not an isolated example; the Moon Court has expanded and broadened environmental protection in a number of cases.⁵⁹

⁵⁴ *Id.*

⁵⁵ *Id.* at 179, 231 P.3d at 452.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Examples of development spanning decades are common in Hawai‘i. The developers of Ko Olina, a 642-acre master-planned resort and residential community in West O‘ahu, first submitted an EIS in 1980. Ko Olina Resort and Marina Home Page, Overview, <http://www.koolina.com/overview> (last visited Mar. 18, 2011); W. BEACH RESORTS, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED WEST BEACH RESORT (Sept. 1980), available at http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Oahu/1980s/1980-09-OA-FEIS-West-Beach-Resort.pdf. The Ko Olina plan called for 1680 residential units, 7520 hotel/condominium units, and various other improvements. *Id.* The most recent building in the project, Disney’s Aulani Resort, broke ground in 2010—thirty years after the original EIS was accepted. The development of the central O‘ahu community of Mililani took over forty years to complete, and even relatively small scale government infrastructure work, such as sewer projects, can routinely take over ten years. Janis L. Magin, *Court’s Turtle Bay Ruling Could Affect Other Hawaii Projects*, PAC. BUS. NEWS, Apr. 16, 2010, available at www.bizjournals.com/pacific/stories/2010/04/19/story7.html.

⁵⁹ See, e.g., *Brescia v. N. Shore Ohana*, 115 Haw. 477, 168 P.3d 929 (2007) (holding the larger shoreline setback applicable); *GATRI v. Blane*, 88 Haw. 108, 962 P.2d 367 (1998) (holding that in the coastal zone, the more restrictive use specified in the county zoning or general plan controls); *Hawaii’s Thousand Friends v. City & Cnty. of Honolulu*, 75 Haw. 237, 858 P.2d 726 (1993); *Superferry II*, 120 Haw. 181, 202 P.3d 1226 (2009) (holding that a proposed demolition of structures in a county park would have a significant environmental impact and required an SMA use permit); *Sierra Club v. Office of Planning*, 109 Haw. 411, 126

B. Zoning Controls

The Moon Court considered a variety of zoning cases, but perhaps its most noteworthy contribution was its extension of the role of the land use plan as the basis for land use control in *Save Sunset Beach Coalition v. City & County of Honolulu (Sunset Beach)*.⁶⁰ The court under Chief Justice Lum had previously established that zoning must conform to development plans in the 1989 decision *Lum Yip Kee, Ltd. v. City and County of Honolulu*.⁶¹ The holding in *Lum Yip Kee* made Hawai'i one of the "states in the forefront of the requirement that zoning must conform to and be based upon comprehensive planning."⁶² In *Sunset Beach*, the Moon Court reiterated the important role of planning in Hawai'i land use law. The court held that in the event of a contradiction between a plan and zoning designation, the more restrictive of the two controls, and that both plan map and zoning map amendments are legislative acts.⁶³

In *Sunset Beach*, the primary issue on appeal was the plaintiffs' challenge⁶⁴ to the Honolulu City Council's grant of rezoning from agricultural to country.⁶⁵ The court rejected the plaintiffs' initial argument that rezoning and amendment of a development plan via county ordinance for the benefit of a specific property are quasi-judicial actions, holding instead that both are *always* legislative acts.⁶⁶ This result is significant because it affords both zoning and development plans a deferential standard of judicial review and a presumption of validity.⁶⁷

The court thus expanded the consistency doctrine established in *GATRI v. Blane*,⁶⁸ which requires that the more restrictive permitted use between a zoning designation and a development plan controls, but only in the coastal zone.⁶⁹ *Sunset Beach* explicitly requires compliance with the most restrictive use of the three tiers of land use controls—state land use districts, county zoning, and development plans—anywhere in the state, not just in the coastal

P.3d 1098 (2006) (holding that a district boundary amendment triggered the requirement for an environmental assessment).

⁶⁰ 102 Haw. 465, 469, 78 P.3d 1, 5 (2003).

⁶¹ 70 Haw. 179, 767 P.2d 815 (1989).

⁶² Callies, Kalama & Kellett, *supra* note 2, at 123.

⁶³ *Sunset Beach*, 102 Haw. at 469, 78 P.3d at 5.

⁶⁴ *Id.* at 468, 78 P.3d at 4. The plaintiffs included two interest groups, Save Sunset Beach Coalition and Life of the Land, and individual residents of the North Shore. *Id.*

⁶⁵ *Id.* at 472, 78 P.3d at 8.

⁶⁶ *Id.* at 473-74, 78 P.3d at 9-10.

⁶⁷ *Id.* at 468, 78 P.3d at 4.

⁶⁸ *GATRI v. Blane*, 88 Haw. 108, 962 P.2d 367 (1998). The holding in *GATRI* applied only to the coastal zone, largely on the ground that the applicable statute so required.

⁶⁹ *Sunset Beach*, 102 Haw. at 482, 78 P.3d at 18.

zone. This outcome is consistent with the recognition of the comprehensive plan as law in *Lum Yip Kee*.

Another important case illustrated that the court would strictly uphold land use controls. In *Korean Buddhist Dae Won Sa Temple v. Sullivan*, the Moon Court considered a challenge to the Director of the Department of Land Utilization's (DLU) refusal to issue a declaratory order or variance to cure a building height violation.⁷⁰ The building was a Korean temple's hall, which included an unpermitted extra floor and exceeded the maximum building height allowed by the building permit.⁷¹ The temple was unsuccessful in its first attempt to obtain a variance from the Director of the DLU as well as in its appeal of his decision to the Zoning Board of Appeals (ZBA).⁷² The temple subsequently filed a separate variance application; the Director again denied it and the temple unsuccessfully appealed to the ZBA and later the circuit court.⁷³

The Hawai'i Supreme Court reasoned that the Director's refusal to issue a declaratory ruling did not rise to the applicable standard of "arbitrary and capricious."⁷⁴ The court also found that the Director relied on sufficient evidence so that he did not abuse his discretion in denying the variance application.⁷⁵ Lastly, the court considered and rejected the temple's claim of a violation on First Amendment free exercise grounds.⁷⁶ Despite the harsh result of a requirement to tear down the offending portion of the structure, the court deferred to the Director's ruling and refused to modify it.⁷⁷

III. COASTAL ZONE MANAGEMENT PROTECTION LAW

A. SMA Permits: Clarification of Obligations to Meet Requirements

Given the tension between development of the coastal area and protection of coastal environmental resources, it is unsurprising that the Special Management Area (SMA) permitting process was the focus of a number of Moon Court cases.⁷⁸

⁷⁰ 87 Haw. 217, 953 P.2d 1315 (1998).

⁷¹ *Id.* at 222, 953 P.2d at 1320.

⁷² *Id.* at 223, 953 P.2d at 1321.

⁷³ *Id.* at 227, 953 P.2d at 1325.

⁷⁴ *Id.* at 230-31, 953 P.2d at 1328-29.

⁷⁵ *Id.* at 235, 953 P.2d at 1333.

⁷⁶ *Id.* at 247, 953 P.2d at 1345.

⁷⁷ *Id.* at 249, 953 P.2d at 1347.

⁷⁸ *Morgan v. Planning Dep't*, 104 Haw. 173, 86 P.3d 982 (2004); *GATRI v. Blane*, 88 Haw. 108, 962 P.2d 367 (1998); *Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (PASH)*, 79 Haw. 425, 903 P.2d 1246 (1995); *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 75 Haw. 237, 858 P.2d 726 (1993).

In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)*, the court held that the Coastal Zone Management Act (CZMA) imposes an obligation to "preserve and protect" Native Hawaiian rights to the extent "reasonable" when issuing an SMA use permit.⁷⁹ The court specified that "in order for any conditions placed on a SMA permit issued by the [Hawai'i County Planning Commission] on remand to be deemed 'reasonable,'"⁸⁰ they must pass the heightened scrutiny test formulated in *Nollan v. California Coastal Commission*⁸¹ and *Dolan v. City of Tigard*.⁸² *PASH* establishes that the requirements of an essential nexus to a legitimate state interest (set forth in *Nollan*) and rough proportionality to the impact of the proposed development (set forth in *Dolan*) apply to conditions placed on land development under the CZMA.⁸³ The decision is also notable for its extended treatment of Native Hawaiian traditional and customary rights guaranteed by the 1978 State Constitution even though the issue before the court was largely one of standing to participate in a county contested case hearing.⁸⁴

In *GATRI v. Blane*,⁸⁵ the Hawai'i Supreme Court held that a party seeking an SMA permit must demonstrate general plan and zoning consistency under Hawai'i Revised Statutes section 205A-26(2)(C).⁸⁶ *GATRI*, a Hawai'i limited partnership, applied for an SMA permit to develop a commercial building on land located within Maui's SMA area.⁸⁷ The Maui County Department of Planning Director denied the permit,⁸⁸ and the trial court reversed,⁸⁹ finding that development consistent with the governing zoning ordinance was per se consistent with the general plan.⁹⁰ However, the Hawai'i Supreme Court ultimately rejected the trial court's interpretation of the statute, finding it inconsistent with fundamental principles of statutory construction.⁹¹ The Moon Court specified that county general plans have the "force and effect of law insofar as the statute requires that a development within the SMA must be

⁷⁹ *PASH*, 79 Haw. at 435, 903 P.2d at 1256.

⁸⁰ *Id.* at 436, 903 P.2d at 1257.

⁸¹ 483 U.S. 825 (1987).

⁸² 512 U.S. 374 (1994).

⁸³ *PASH*, 79 Haw. at 436, 903 P.2d at 1257.

⁸⁴ *See id.* at 437-51, 903 P.2d at 1258-72.

⁸⁵ 88 Haw. 108, 962 P.2d 367 (1998).

⁸⁶ Hawai'i Revised Statutes section 205A-26(2)(C) requires "[t]hat the development [be] consistent with the county general plan and zoning. Such a finding of consistency does not preclude concurrent processing where a general plan or zoning amendment may also be required."

⁸⁷ *GATRI*, 88 Haw. at 109, 962 P.2d at 368.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 114, 962 P.2d at 374.

consistent with the general plan.”⁹² Thus, after *GATRI*, SMA permits are subject to a double consistency requirement.

B. SMA Permits and Process: Strict Construction of Procedural Requirements

The Moon Court continued to construe the procedural requirements of the CZMA strictly.⁹³ In *Hawaii's Thousand Friends v. City & County of Honolulu*,⁹⁴ the City and County of Honolulu's (City) Department of Land Utilization (DLU) determined that the City's Department of Parks and Recreation (DPR) was not required to obtain an SMA use permit for its proposed demolition of several structures on a parcel within the coastal zone management area.⁹⁵ Hawaii's Thousand Friends (Friends), a community organization, sought a declaratory order that an SMA use permit was required for the demolition.⁹⁶ The First Circuit Court held that “where demolition of existing structures is part of an overall project, and where such project may have a significant environmental impact on the special management area, the demolition is ‘development’ within the meaning of chapter 25,” and thus an SMA permit is required.⁹⁷ The Hawai‘i Supreme Court rejected the City’s contention that Friends was required to exhaust its administrative remedies by seeking review by the Zoning Board of Appeals (ZBA) prior to appealing its case to the circuit court.⁹⁸ The court reasoned that the jurisdiction of the ZBA did not include SMA review, because section 6-909(a) of the Honolulu Charter “restricts appeals to the ZBA from those DLU actions concerning ‘the administration of the zoning and subdivision ordinances[.]’”⁹⁹ The court also rejected the City’s second jurisdictional argument that because Friends had available to it the statutory remedy provided in Hawai‘i Revised Statutes section 205A-6, the circuit court erred in granting jurisdiction to consider relief by declaratory judgment under Hawai‘i Revised Statutes section 632-1.¹⁰⁰

In *Morgan v. Planning Department*, the Kaua‘i County Planning Commission granted an SMA use permit to build a rock revetment on shoreline property, but the landowner instead built a seawall.¹⁰¹ Several years later,

⁹² *Id.*

⁹³ Callies, Kalama & Kellett, *supra* note 2, at 134.

⁹⁴ 75 Haw. 237, 858 P.2d 726 (1993).

⁹⁵ *Id.* at 238-39, 858 P.2d at 728.

⁹⁶ *Id.* at 239, 858 P.2d at 728.

⁹⁷ *Id.* at 241, 858 P.2d at 729.

⁹⁸ *Id.* at 244, 858 P.2d at 730.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 245, 858 P.2d at 731.

¹⁰¹ 104 Haw. 173, 175, 86 P.3d 982, 984 (2004).

neighboring landowners complained that the revetment had caused the erosion of beach area in front of their properties.¹⁰² After a number of public hearings, "the Planning Commission issued its findings of fact, conclusions of law, decision and order[.]" and modified a condition of the original SMA permit.¹⁰³ On appeal, the circuit court held that the Planning Commission lacked authority to modify an SMA permit.¹⁰⁴ The Hawai'i Supreme Court reversed, reasoning that a Hawai'i planning commission "has authority to reconsider a validly issued SMA [u]se permit, inasmuch as the Planning Commission's enabling statute requires that the Planning Commission carry out the policies and objectives of the [Coastal Zone Management Act.]"¹⁰⁵

IV. PUBLIC TRUST DOCTRINE

The concept of the public trust is a common law doctrine that requires the state to hold title to certain natural resources in trust for the public. Hawai'i's public trust doctrine evolved under a "complex interweaving of unique principles of Hawai'i law . . . [with] shared aspects of American jurisprudence," and can conceptually be traced back to the ancient Hawaiian system of water rights.¹⁰⁶ In 1899, the Republic of Hawai'i's high court introduced the U.S. Supreme Court's rule from *Illinois Central Railroad Co. v. Illinois*¹⁰⁷ to Hawai'i, holding that title to the submerged lands of Honolulu Harbor were "held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."¹⁰⁸ Subsequent cases illustrated the firm establishment of the doctrine in Hawai'i's jurisprudence.¹⁰⁹

¹⁰² *Id.* at 176, 86 P.3d at 985.

¹⁰³ *Id.* at 177, 86 P.3d at 986.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 182, 86 P.3d at 991.

¹⁰⁶ Keala C. Ede, *He Kanawai Pono No Ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In Re Water Use Permit Applications*, 29 ECOL. L.Q. 283, 288 (2002).

¹⁰⁷ 146 U.S. 387 (1892). The U.S. Supreme Court noted that it was "the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found." *Id.* at 435. See generally Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849 (2001).

¹⁰⁸ *King v. Oahu Ry. & Land Co.*, 11 Haw. 717, 723 (1899) (quoting *Illinois Central R.R. Co.*, 146 U.S. at 452).

¹⁰⁹ See, e.g., *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) ("Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e. g., recreation.").

Groundwater resources, however, were not recognized as part of the State's public trust. Historically, Hawai'i's territorial courts instead recognized "absolute [private] ownership" over groundwater, so that an overlying landowner could pump

all of the water that naturally flows from the well or that can be drawn therefrom by any pump, however powerful, and . . . he may use the water as he pleases and may conduct it to supply lands and communities at any distance from his own piece or parcel of land and may even waste it.¹¹⁰

The rule of absolute ownership was abandoned in 1929, when the court adopted a "correlative rights" rule: an overlying landowner could use as much groundwater as was needed for the overlying property, so long as such usage did not interfere with the rights of other surface owners.¹¹¹ Correlative rights remained a cornerstone of Hawai'i water law for over seventy years, until the Moon Court's voluminous *Waiāhole I* decision in 2000.¹¹²

The litigation surrounded the Waiāhole Ditch System, which had diverted groundwater from windward to central O'ahu for sugar cultivation since the early 1900s.¹¹³ After the O'ahu Sugar Company, a primary user of the ditch system, announced it would cease operations in 1993, various groups petitioned for use or conservation of the newly available water.¹¹⁴ Over two dozen applications from leeward farmers, windward community associations, and surface owners, among others,¹¹⁵ were sent to a newly-established Water Resource Management Commission and eventually consolidated into one exhaustive contested case hearing lasting nearly a year.¹¹⁶ The Commission allocated the water largely to leeward agricultural and non-agricultural uses and "system losses," for "proposed agricultural reserve," or a "non-permitted ground water buffer" to be released in windward streams.¹¹⁷ Several parties appealed the allocation, including the nonagricultural users widely perceived to have "won" before the Commission.

The Hawai'i Supreme Court criticized not only portions of the Commission's allocation, but also its "permissive view towards stream diversion."¹¹⁸ Noting that it had "rejected the idea of public streams serving as convenient reservoirs

¹¹⁰ *City Mill Co. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912, 922 (1929), *overruled by Waiāhole I*, 94 Haw. 97, 177, 9 P.3d 409, 489 (2000).

¹¹¹ *City Mill Co.*, 30 Haw. at 923-28.

¹¹² *Waiāhole I*, 94 Haw. 97, 9 P.3d 409 (2000). *See generally* David L. Callies & Calvert G. Chipchase, *Water Regulation, Land Use and the Environment*, 30 U. HAW. L. REV. 49 (2007).

¹¹³ *Waiāhole I*, 94 Haw. at 111, 9 P.3d at 423.

¹¹⁴ *Id.* at 112, 9 P.3d at 424.

¹¹⁵ Callies & Chipchase, *supra* note 112, at 67.

¹¹⁶ *Waiāhole I*, 94 Haw. at 113, 9 P.3d at 425.

¹¹⁷ *Id.* at 118, 9 P.3d at 430.

¹¹⁸ *Id.* at 160, 9 P.3d at 472.

for offstream private use,”¹¹⁹ the court found that the Commission’s decision had “largely defeat[ed] the purpose of the instream use protection scheme set forth in [the Hawai‘i Water Code]”¹²⁰ and reiterated that “[e]very cessation to immediate offstream demands made by the Commission increases the risk of unwarranted impairment of instream values, ad hoc planning, and arbitrary distribution.”¹²¹ In so finding, the court remanded the case to the Commission for additional findings and conclusions regarding the evidence and methodology used by the Commission in making its allocations.¹²² Ultimately, the Hawai‘i Supreme Court vacated most of the Commission’s commercial allocations, including many initially provided to leeward O‘ahu farmers. Although the majority of growth (as projected by O‘ahu’s general and development plans, with which the Water Commission was required to comply) was to occur in leeward O‘ahu, the court nevertheless found such allocations unsupported by the record.¹²³

More important than the allocations, however, was the court’s dramatic expansion of the public trust and its use to trump the statutory hierarchy painstakingly established in the Hawai‘i Water Code. The court uncritically accepted the Commission’s view that the public trust applied to all “water resources” within the state, regardless of navigability.¹²⁴ It relied on (1) Hawai‘i constitutional amendments that the court “interpreted” as extending the public trust to underground water,¹²⁵ and (2) a historical interpretation that the Kingdom of Hawai‘i had reserved title to water to itself, so that groundwater rights did not transfer with changes in ownership.¹²⁶ The court committed itself to balancing public and private purposes with a presumption in favor of public use, access, and enjoyment, while paying scant attention to the water code’s careful hierarchical allocation framework coupled with statutorily required reliance on county plans.¹²⁷ New standards were also created. Surface owners in non-designated areas were required to obtain Commission approval for any requested withdrawal to determine whether it was “necessary for reasonable use.”¹²⁸ This effectively put surface owners in no better position than any other applicant.

¹¹⁹ *Id.* at 155, 9 P.3d at 467.

¹²⁰ *Id.* at 154, 9 P.3d at 466.

¹²¹ *Id.*

¹²² Callies & Chipchase, *supra* note 112, at 69.

¹²³ *Id.* at 72.

¹²⁴ *Waiāhole I*, 94 Haw. at 128-35, 9 P.3d at 440-47.

¹²⁵ Callies & Chipchase, *supra* note 112, at 69.

¹²⁶ *Waiāhole I*, 94 Haw. at 128-35, 9 P.3d at 440-47.

¹²⁷ *Id.* at 142, 9 P.3d at 454.

¹²⁸ *Id.* at 178, 9 P.3d at 490.

Both premises relied upon by the court are seriously flawed. First, the constitutional amendments of the 1970s cannot “inform private property rights established over a hundred years earlier” during the Great Māhele.¹²⁹ Thus, “[t]he titles that passed to private owners from the Kingdom of Hawai‘i cannot be rewritten to exclude what at the time of transfer was an appurtenance of real property.”¹³⁰ Second, Hawai‘i territorial decisions held that the Kingdom did *not* retain ownership of groundwater when real property was transferred to a private owner.¹³¹ Therefore, groundwater *was* owned by private individuals, subject to the usage limitations of correlative rights. The court’s *Waiāhole I* decision, broadening the public trust and reducing a surface owner’s ability to make reasonable use of underlying water, ultimately marked the loss of an individual owner’s property rights, resulting in a “taking” in every sense of the word.

V. EMINENT DOMAIN

In a bow to securing private property rights, the court added a substantive requirement for every governmental exercise of eminent domain: consideration of a pretextuality defense, added on the strength of a brief line in a concurring opinion from the U.S. Supreme Court.¹³² The remaining cases in this category dealt with problems raised by the 1967 Land Reform Act,¹³³ which used condemnation to transfer fee title in real property from lessors to lessees in an attempt to eradicate what the Hawai‘i Legislature deemed the “social and economic evils of a land oligopoly.”¹³⁴

A. “Public Use,” “Public Purpose,” and Pretext

The significance of the Moon Court’s decision in *County of Hawai‘i v. C & J Coupe Family Limited Partnership (Coupe I)*¹³⁵ requires a basic understanding of eminent domain, the government’s ability to take a private citizen’s land or an interest in land. The main constitutional protections to such an action are provided by the Fifth Amendment to the U.S. Constitution, requiring that any private property taken must be for “public use” and accompanied by payment of “just compensation.”¹³⁶

¹²⁹ Callies & Chipchase, *supra* note 112, at 73.

¹³⁰ *Id.*

¹³¹ *Id.* at 74.

¹³² See *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

¹³³ HAW. REV. STAT. ch. 516 (2006 & Supp. 2010).

¹³⁴ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241-42 (1984).

¹³⁵ 119 Haw. 352, 198 P.3d 615 (2008).

¹³⁶ U.S. CONST. amend. V.

However, following the U.S. Supreme Court's virtual elimination of the public use clause of the Fifth Amendment in *Hawaii Housing Authority v. Midkiff*,¹³⁷ and the subsequent confirmation in *Kelo v. City of New London* that not only did public use equal public purpose, but that "economic revitalization" or "rejuvenation" constituted such a public purpose,¹³⁸ one check arguably remained on the use of eminent domain: pretext.¹³⁹ Although a condemnation need only be "rationally related to a conceivable public purpose," a transfer of property via eminent domain that "intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits . . . [remained] forbidden by the Public Use Clause."¹⁴⁰

The poster child case of pretextual condemnation involved the condemnation of one retailer to placate another, more influential, retailer in California. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,¹⁴¹ Costco moved into a shopping mall as an anchor tenant, followed by a 99 Cents Only Store into a nearby vacant space.¹⁴² Costco later demanded that it be allowed to expand into the space leased by the 99 Cents Only Store.¹⁴³ Unable to reach an agreement, the city ultimately initiated "friendly eminent domain proceedings" to acquire the space for Costco's expansion.¹⁴⁴ The U.S. District Court for the Central District of California noted the low *Midkiff* standard of "rationally related to a conceivable public purpose," but found that "[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual."¹⁴⁵ The condemnation of the 99 Cents Only Store was nothing more than the "naked transfer of property from one private party to another."¹⁴⁶ The court also rejected the city's feeble argument that losing Costco could result in "future blight" to the area¹⁴⁷ and enjoined the condemnation.¹⁴⁸

While the purpose of some condemnations for urban renewal and economic revitalization may well prove to be pretextual, most condemnations for *use by the public* are unequivocally *not* pretextual, such as condemnation to build or expand public roads. Overturning all courts below, the Moon Court¹⁴⁹ found

¹³⁷ 467 U.S. at 241.

¹³⁸ 545 U.S. 469, 483 (2005).

¹³⁹ *Id.* at 490 (Kennedy, J., concurring).

¹⁴⁰ *Id.*

¹⁴¹ 237 F. Supp. 2d 1123, 1125 (C.D. Cal. 2001).

¹⁴² *Id.* at 1126.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1129.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1130.

¹⁴⁸ *Id.* at 1131.

¹⁴⁹ Chief Justice Moon dissented from the majority's holding that the "asserted public purpose was pretextual." *Coupe I*, 119 Haw. 352, 390, 198 P.3d 615, 653 (2008) (Moon, C.J.,

public use road condemnations potentially pretextual in *Coupe I*.¹⁵⁰ There, as part of the statutorily-authorized development agreement¹⁵¹ to develop the Hokuli‘a luxury golf-course community project on the island of Hawai‘i,¹⁵² the developer had agreed to construct a bypass road to alleviate traffic congestion and create additional access from existing roads.¹⁵³ After the developer failed to procure all the necessary land through negotiation, the developer requested that the County initiate condemnation proceedings for the hold-out parcels in accordance with the terms of its statutory development agreement with the County of Hawai‘i, which had planned for such a bypass road for decades.¹⁵⁴ In challenging the government’s use of eminent domain, a hold-out landowner claimed that the condemnation was “instituted for the private benefit of [the developer],” in violation of the public use clause of the U.S. Constitution.¹⁵⁵

In an opinion at odds with nearly all jurisdictions, including the U.S. Supreme Court,¹⁵⁶ a three-justice majority of the Hawai‘i Supreme Court¹⁵⁷ held that a public highway was not necessarily a public *use*. According to the court, “although our courts afford substantial deference to the government’s asserted public purpose for a taking in condemnation proceeding, where there is evidence that the asserted purpose is pretextual, courts should consider a landowner’s defense of pretext.”¹⁵⁸ Requiring courts to consider a pretext argument for a public use—here a road condemnation—is at odds with decades of precedent.¹⁵⁹ The U.S. Supreme Court stated as early as 1923: “That a

dissenting).

¹⁵⁰ 119 Haw. 352, 198 P.3d 615. See generally Robert H. Thomas, *Recent Developments in Public Use and Pretext in Eminent Domain*, 41 URB. LAW. 563, 565-68 (2009).

¹⁵¹ See generally DAVID L. CALLIES, DANIEL J. CURTIN, JR. & JULIE A. TAPPENDORF, *BARGAINING FOR DEVELOPMENT* 95-115 (2003) (discussing development agreements); HAW. REV. STAT. § 46-123 (1993). During the development approval process, developers and local government face two problems: the local government’s inability to exact dedications of land or fees to mitigate the impact of the development without establishing a clear connection between the proposed development and the dedication or fee, and the developer’s inability to rely on a vested right to continue the development until the project begins. Development agreements, often authorized by statute (as in Hawai‘i), can address both problems. *Id.* at 95.

¹⁵² *Coupe I*, 119 Haw. at 356, 198 P.3d at 619.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 359, 198 P.3d at 622.

¹⁵⁵ *Id.*

¹⁵⁶ See *Rindge Co. v. Los Angeles Cnty.*, 262 U.S. 700 (1923).

¹⁵⁷ The majority consisted of Justices Nakayama, Acoba, and Duffy. Justice Levinson joined in Chief Justice Moon’s dissent.

¹⁵⁸ *Coupe I*, 119 Haw. at 357, 198 P.3d at 620.

¹⁵⁹ See, e.g., *Rogren v. Corwin*, 147 N.W. 517, 519 (Mich. 1914) (“That private property may be constitutionally taken for public highways cannot be doubted, and is not denied.”); *Rodgers Dev. Co. v. Town of Tilton*, 781 A.2d 1029, 1034 (N.H. 2001) (“It is well settled that whenever property is taken for a highway, it is for the public use[.]”) (internal quotation marks

taking of property for a highway is a taking for public use has been universally recognized, from time immemorial."¹⁶⁰

Nevertheless, the Hawai'i Supreme Court remanded to the circuit court to take evidence on pretext. That court ultimately found that the County's asserted public purpose was *not* pretext for a primarily private benefit.¹⁶¹ Citing cases from several jurisdictions, the court unsurprisingly found "the record reflect[ed] that [the developer] was not the only entity that stood to benefit from the construction of the Bypass."¹⁶² In fact, over the decades, many studies and plans undertaken by the County had recognized the public's need for the bypass.¹⁶³ While the pretext claim in *Coupe I* ultimately failed, the fact that it was so much as entertained by the Hawai'i Supreme Court over condemnation of land for a public road demonstrates that pretext is now a feasible property owner's defense to *any* condemnation in Hawai'i.

B. Eminent Domain for "Land Reform"

The other major eminent domain cases during the Moon era addressed issues initially raised by the 1967 Land Reform Act,¹⁶⁴ a statute that effectively used condemnation to transfer fee title in real property from lessors to lessees. The Legislature had found that a mere twenty-two landowners owned 72.5% of fee simple titles on O'ahu, and that across the state seventy-two private landowners owned 47% of the state's land.¹⁶⁵ In order to reduce the "social and economic evils of a land oligopoly," the Legislature passed the Act to force the transfer of fee simple interests to the lessee-owners of the respective residences atop the leasehold.¹⁶⁶ The U.S. Supreme Court upheld this scheme in *Hawaii Housing Authority v. Midkiff*, stating that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers"¹⁶⁷ Thus, with the confusing conflation of police power and public use in *Berman v. Parker*,¹⁶⁸ transfers of title under the Land Reform Act passed the public use test even though the result was to transfer an interest in land from one private owner to another, thereby opening the door for arguments equating public *use* (the constitutional term in the Fifth Amendment) with public *purpose*.

and citation omitted).

¹⁶⁰ *Rindge Co.*, 262 U.S. at 706.

¹⁶¹ *Coupe III*, 124 Haw. 281, 242 P.3d 1136 (2010).

¹⁶² *Id.* at 298, 242 P.3d at 1153.

¹⁶³ *Id.* at 298-99, 242 P.3d at 1153-54.

¹⁶⁴ HAW. REV. STAT. ch. 516 (2006 & Supp. 2010).

¹⁶⁵ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

¹⁶⁶ *Id.* at 241-42.

¹⁶⁷ *Id.* at 242.

¹⁶⁸ 348 U.S. 26 (1954).

The Moon Court took up several subsequent challenges to lease-to-fee conversions. In *Richardson v. City and County of Honolulu*, plaintiffs challenged the Honolulu City Council's enactment of the county-level version of the Land Reform Act.¹⁶⁹ Plaintiff landowners alleged that the City lacked authority to pass the ordinance because of preemption by various state statutes and because the State had not delegated such authority to the City.¹⁷⁰ The *Richardson* court rejected such arguments, instead finding the allegedly conflicting statutes "neither limit the counties' (and therefore the City's) general power of eminent domain . . . nor divest them of the authority to enact ordinances allowing for the condemnation of land for any particular public purpose."¹⁷¹ The court also found that the City had not improperly delegated its power of eminent domain to the Department of Housing and Community Development:¹⁷² the Department was empowered merely to designate land for condemnation, facilitating the City's actual exercise of the power of eminent domain.¹⁷³

In *Housing Finance and Development Corp. v. Castle*,¹⁷⁴ the court addressed whether the Hawai'i Land Reform Act "remained constitutional, *i.e.*, whether the HLRA continues to comport with the 'public use' clauses" of the U.S. and Hawai'i Constitutions.¹⁷⁵ Trustees of the Castle Estate, which held the leased fee interest in the residential houselots subject to the condemnation, brought the challenge.¹⁷⁶ Up against the unfavorable precedent of *Midkiff*¹⁷⁷ and *Lyman*,¹⁷⁸ which upheld the constitutionality of the Act, plaintiffs argued that "[n]either [*Midkiff* nor *Lyman*] held that henceforth or forever into the future every condemnation of a leased fee pursuant to [the HLRA] would necessarily be for a public purpose."¹⁷⁹ The trustees urged that condemnation of the specific houselots in question did not satisfy the public use requirement, but the court rejected the contention that "HLRA can vacillate in and out of constitutionality depending upon the condition of the residential real estate market in Hawai'i at

¹⁶⁹ 76 Haw. 46, 51-52, 868 P.2d 1193, 1198-99 (1994). This was codified as chapter 38 of the Honolulu Revised Ordinances and applies to multi-family developments held as condominiums, cooperative housing developments, and planned unit developments. HONOLULU, HAW., REV. ORDINANCES ch. 38 (1992).

¹⁷⁰ *Richardson*, 76 Haw. at 53, 868 P.2d at 1200.

¹⁷¹ *Id.* at 57, 868 P.2d at 1204.

¹⁷² *Id.* at 58-59, 868 P.2d at 1205-06.

¹⁷³ *Id.*

¹⁷⁴ 79 Haw. 64, 898 P.2d 576 (1995).

¹⁷⁵ *Id.* at 73, 898 P.2d at 585.

¹⁷⁶ *Id.* at 78, 898 P.2d at 590.

¹⁷⁷ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁷⁸ *Haw. Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985).

¹⁷⁹ *Hous. Fin. & Dev. Corp.*, 79 Haw. at 86, 898 P.2d at 598.

any given moment.”¹⁸⁰ Instead, the court reiterated that under the U.S. Supreme Court’s standard in *Midkiff*, “it is irrelevant whether the legislature was empirically correct in the first place, so long as the legislature *rationally could have believed* that it was.”¹⁸¹

The court later rejected a church’s federal Religious Land Use and Institutionalized Persons Act (RLUIPA) defense to eminent domain under the Act in *City & County of Honolulu v. Sherman*.¹⁸² Plaintiff church claimed lease-to-fee conversion was a land use regulation that impermissibly interfered with the church’s exercise of religion.¹⁸³ The court found instead that chapter 38 condemnation was not a “land use regulation” under RLUIPA,¹⁸⁴ demonstrating the gap in RLUIPA under which a regulation is subject to strict scrutiny but an appropriation of land is apparently permissible.¹⁸⁵ The *Sherman* court also addressed the church’s claim that the City had improperly delegated the power of eminent domain to the City Department of Community Service (DCS).¹⁸⁶ The church attempted to distinguish the *Richardson* holding on the issue as mere facial consideration, and in practice, the DCS’s determination to condemn land was being interpreted by the City as a legal mandate to initiate the condemnation proceedings.¹⁸⁷ The court found that *Richardson*’s holding was still applicable and that DCS’s actions merely facilitated the City’s ultimate act of condemnation.¹⁸⁸

¹⁸⁰ *Id.* at 87, 898 P.2d at 599.

¹⁸¹ *Id.* at 90, 898 P.2d at 602 (emphasis in original).

¹⁸² 110 Haw. 39, 129 P.3d 542 (2006). RLUIPA is a federal statute designed to protect religious institutions from regulations—specifically including zoning—which adversely affect the practice of religion. For a detailed explanation of RLUIPA and a survey of cases, see RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS (Michael S. Giaimo & Lora A. Lucero eds., 2009).

¹⁸³ *Sherman*, 110 Haw. at 55-56, 129 P.3d at 558-59.

¹⁸⁴ *Id.* at 61, 129 P.3d at 564.

¹⁸⁵ *See id.*; see also Robert H. Thomas, 2006 *Land Use in Review: Land Reform Revisited*, INVERSECONDEMNATION.COM (Dec. 30, 2006), http://www.inversecondemnation.com/inversecondemnation/2006/12/2006_land_use_i_3.html (“It does seem odd for Congress to have excluded an outright *appropriation* of a church’s property, while requiring strict scrutiny for mere *regulation*. If onerous regulatory decisions should be judged strictly by the courts to insure they do not interfere with the free exercise of religion, how is that actually depriving a church of its property should be immune from such scrutiny?” (emphases in original)).

¹⁸⁶ *Sherman*, 110 Haw. at 69, 129 P.3d at 572.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 70, 129 P.3d at 573.

VI. CONDOMINIUM APARTMENTS¹⁸⁹

By way of an introduction, the characteristics of a condominium property regime are (1) individual ownership of a unit in the project, (2) an undivided interest in the common elements of the project (the swimming pool, parking lot, and underlying land, for example), and (3) some form of agreement between the owners regulating how the project will be run. It becomes easy to see that these characteristics present unique challenges.¹⁹⁰ With Hawai'i having the highest percentage of condominium unit occupancy in the nation, it is no surprise that the Moon Court took several cases to flesh out the mechanics of condominium associations.

Because condominium ownership is characterized by mixed joint and separate ownership, determining the proper party to bring a lawsuit is not always clear. In *Alford v. City and County of Honolulu*,¹⁹¹ owners in a condominium project sued the City in an attempt to restore the real property tax classification of their units from "hotel and resort" back to "apartment."¹⁹² The case turned on whether the Board of Directors had standing to authorize a representative to bring appeals on behalf of the owners.¹⁹³ Acknowledging that the statutory directive allowed a board to bring an action that related to more than one apartment, the City argued that county law giving only a taxpayer the right to bring an appeal should prevail.¹⁹⁴ The Hawai'i Supreme Court rejected this argument and held that the Board of Directors of the condominium association had standing to authorize a representative to bring tax appeals on behalf of the owners of fee units.¹⁹⁵

Condominium operations procedure, in terms of how an association meeting should be conducted, also came before the court. Association meetings usually abide by parliamentary procedure, most commonly as laid out by *Robert's Rules of Order*.¹⁹⁶ In *Alvarez Family Trust v. Association of Apartment Owners of Kaanapali Alii*,¹⁹⁷ a board's voting mechanism was challenged.¹⁹⁸

¹⁸⁹ "Condominium" is a form of ownership, not a residential unit, as any careful real estate lawyer knows, but for the purposes of this section we use it as the vernacular noun it has become.

¹⁹⁰ *State Savings & Loan Ass'n v. Kauaian Dev. Co.*, 50 Haw. 540, 445 P.2d 109 (1968), was the first case to apply "condominium law" in Hawai'i. The opinion paved the way for condominiums to be received in the common law system in Hawai'i.

¹⁹¹ 109 Haw. 14, 122 P.3d 809 (2005).

¹⁹² *Id.* at 17, 122 P.3d at 812.

¹⁹³ *Id.* at 23-24, 122 P.3d at 818-19.

¹⁹⁴ *Id.* at 24, 122 P.3d at 819.

¹⁹⁵ *Id.* at 25, 122 P.3d at 820.

¹⁹⁶ 1 GARY A. POLIAKOFF, *LAW OF CONDOMINIUM OPERATIONS* § 3:49 (1988).

¹⁹⁷ 121 Haw. 474, 221 P.3d 452 (2009).

¹⁹⁸ *Id.* at 478, 221 P.3d at 456.

Of the seven directors present at the meeting regarding “a ‘pricing policy’ setting the price at which the Association would sell its leased fee interests to its members,”¹⁹⁹ three voted “for,” two voted “against,” and two abstained.²⁰⁰ The Board deemed the policy approved.²⁰¹ The court found that the pricing policy was not validly passed because the Association’s bylaws adopted a “members present” requirement for the Board to act,²⁰² so that the presence of members must be taken into account when calculating the majority.²⁰³ Because there were seven directors at the meeting, four affirmative votes were required to pass the measure.²⁰⁴ In so holding, the court rejected the owners’ argument that, pursuant to *Robert’s Rules of Order*,²⁰⁵ because the two members who abstained did so due to a conflict of interest, their presence should not have been counted.²⁰⁶ The court held that the Association’s adoption of the “members present” method of tabulating votes was allowed by *Robert’s*, and was therefore proper.²⁰⁷

In *Association of Apartment Owners of Maalaea Kai, Inc. v. Stillson*,²⁰⁸ the Association brought a foreclosure action against the owners for failure to pay the monthly conversion surcharge after the Association purchased the leased fee interest.²⁰⁹ The defendants claimed the measure was not validly passed based on how the association calculated owner votes.²¹⁰ Overruling the trial court, the Hawai’i Supreme Court held that seventy-five percent ownership approval was statutorily sufficient,²¹¹ and that the Association could rely on the *method* of voting specified by their bylaws.²¹² Furthermore, the court found that even if there had been a defect in procedure, the purchase of the leased fee interests by over seventy-five percent of the owners in the condominium project constituted ratification.²¹³

¹⁹⁹ *Id.* at 476, 221 P.3d at 454.

²⁰⁰ *Id.* at 479, 221 P.3d at 457.

²⁰¹ *Id.* at 478, 221 P.3d at 456.

²⁰² *Id.* at 484, 221 P.3d at 462.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Hawai’i law requires that all association and board of directors meetings shall be conducted in compliance with the most current edition of *Robert’s Rules of Order*. HAW. REV. STAT. § 514A-82(a)(16) (Supp. 2010).

²⁰⁶ *Alvarez*, 121 Haw. at 484, 221 P.3d at 464.

²⁰⁷ *Id.*

²⁰⁸ 108 Haw. 2, 116 P.3d 644 (2005).

²⁰⁹ *Id.* at 4, 116 P.3d at 646.

²¹⁰ *Id.* at 5-7, 116 P.3d at 647-49.

²¹¹ *Id.* at 7, 116 P.3d at 649. Hawai’i Revised Statutes section 514C-6(a) requires seventy-five percent approval.

²¹² *Id.* at 9, 116 P.3d at 651.

²¹³ *Id.* at 15, 116 P.3d at 657.

Finally, in *Arthur v. Sorensen*,²¹⁴ the issue was whether Hawai'i's Condominium Property Act²¹⁵ governed a particular transaction.²¹⁶ The plaintiffs sold options in a condominium project to defendant buyers, with final payment due upon issuance of the final public report or a year after execution of the reservation and sales agreements.²¹⁷ After a final report was issued, the buyers sought to back out of the transaction, claiming the letter agreement was invalid.²¹⁸ The buyers claimed the Condominium Property Act governed the sale of the options they purchased and that they could escape their obligations because they entered the agreement before the developer issued its final report.²¹⁹ Although the court found the buyers were not bound to perform under the reservation and sales agreements, they could not rely on the Act to nullify the letter agreements.²²⁰ The clear intent of the Act was to protect prospective purchasers from "unscrupulous and/or fiscally irresponsible developers by requiring all deposits to be placed in escrow."²²¹ The court found that these references to "escrow" belied the buyer's argument that they fell within the protected class because (1) their money was not placed in escrow, and (2) upon cancellation there would be nothing to return to the buyers since they had purchased an opportunity rather than actual apartments.²²² Therefore, any lost opportunity costs associated with the purchase of the options had to fall upon the buyers rather than the sellers.²²³

VII. EASEMENTS

In two cases, the court demonstrated its proclivity for preserving access at the expense of a landowner's right to exclude.

A. Easements Based on Ancient or Historical Use

The Hawai'i Supreme Court in 2004 addressed easements and kuleana access rights in *Bremer v. Weeks*.²²⁴ The plaintiff, who owned kuleana land, claimed a right of way over a portion of a trail owned by defendant.²²⁵ The

²¹⁴ 80 Haw. 159, 907 P.2d 745 (1995).

²¹⁵ HAW. REV. STAT. ch. 514A (Supp. 2010).

²¹⁶ *Arthur*, 80 Haw. at 163, 907 P.2d at 749.

²¹⁷ *Id.* at 161, 907 P.2d at 747.

²¹⁸ *Id.*

²¹⁹ *Id.* at 163, 907 P.2d at 749.

²²⁰ *Id.* at 166, 907 P.2d at 752.

²²¹ *Id.* at 166-67, 907 P.2d at 752-53.

²²² *Id.*

²²³ *Id.* at 167, 907 P.2d at 753.

²²⁴ 104 Haw. 43, 85 P.3d 150 (2004).

²²⁵ *Id.* at 48, 85 P.3d at 155.

plaintiff's claim was based on ancient or historical use under Hawai'i Revised Statutes section 7-1²²⁶ as well as an easement based on necessity, despite having access via another trail.²²⁷

Reversing the lower court, the Hawai'i Supreme Court acknowledged that "[n]o Hawai'i cases specifically set out the parameters for defining what is sufficient to constitute 'ancient' or 'historic' use for purposes of establishing a claim to a right of way under [Hawai'i Revised Statutes section] 7-1."²²⁸ The court rejected the lower court's suggestion that such a "stringent evidentiary showing" was required.²²⁹ Rather than require evidence of "*who* opened the trail, *when* that event took place, under *what authority*, for *whose benefit*, the *duration* of any use, the *cessation* of any use and the *connection* between the trail and Plaintiff's *kuleana* in terms of use,"²³⁰ the court found that the plaintiff had raised a genuine issue of material fact as to ancient or historic usage based in part on a 1908 map showing a horse trail that allegedly represented historical access.²³¹ Thus, although the plaintiff did not introduce any evidence regarding use of the trail by predecessors or others, as was presented in the 1968 case *Palama v. Sheehan*,²³² the court found that summary judgment was not appropriate.²³³

The court also found the plaintiff's necessity claim was ripe,²³⁴ since the agreements with the previous owners constituted a mere revocable license.²³⁵ According to the court, "a claim of easement by necessity will not be defeated on the basis that an alternate route to the claimant's land exists where the claimant does not have a legally enforceable right to use the alternate route."²³⁶

B. Undefined Easements

In *Clog Holdings, N.V. v. Bailey*, the owners of ocean cliff property on Maui subdivided their land and created a pedestrian access easement across one lot in

²²⁶ Section 7-1 recognizes Native Hawaiian gathering rights, specifically "the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use The people shall also have a right to drinking water, and running water, and the right of way." HAW. REV. STAT. § 7-1 (2009).

²²⁷ *Bremer*, 104 Haw. at 48-49, 85 P.3d at 155-56.

²²⁸ *Id.* at 64, 85 P.3d at 171.

²²⁹ *Id.* at 65, 85 P.3d at 172.

²³⁰ *Id.* (emphases added).

²³¹ *Id.* at 64-65, 85 P.3d at 171-72.

²³² 50 Haw. 298, 440 P.2d 95 (1968) (recognizing kuleana landowner access rights).

²³³ See *Bremer*, 104 Haw. at 65, 85 P.3d at 172.

²³⁴ *Id.* at 69, 85 P.3d at 176.

²³⁵ *Id.*

²³⁶ *Id.* at 67, 85 P.3d at 174.

favor of two other lots.²³⁷ Their intent was twofold: to create a marketing strategy to ensure there was beach and ocean access to the other lots, and to ensure their own access to the beach and ocean should they retain any of their property.²³⁸ Former Beatle George Harrison ultimately purchased the servient estate, and, apparently unaware of the encumbrance, built a house within one hundred feet of the public easement.²³⁹ While his realtor claimed Harrison had been informed, and the real estate sales contract noted the easement, Harrison's title insurance indicated the lot was free of any encumbrances and it failed to appear in the deed.²⁴⁰ Harrison, now with a Maui home considerably less private than he expected, challenged the existence of the easement.²⁴¹

The court first found that Harrison had actual notice of the easement based on the sales contract.²⁴² Because there were conflicts in the documents surrounding the transaction, the court stated that "[i]t was unreasonable to disregard these discrepancies in the documents simply because a limited title search failed to reveal the easement. Rather, the discrepancies should have prompted the escrow company to notify the parties to conduct an in-depth investigation to ascertain the truth."²⁴³ The court also found that the circuit court erred in finding the description of the easement to be ambiguous.²⁴⁴ The court ultimately held that a court can relocate an easement only when the easement is *not* located in the grant or reservation.²⁴⁵ Just because Harrison failed to do his title homework did not constitute grounds upon which the court could adjust the easement.

VIII. COVENANTS, CONDITIONS, AND RESTRICTIONS

The use of covenants, conditions, and restrictions (CCRs) to control land use in common interest communities and other developments is standard practice across the United States.²⁴⁶ Restrictive covenants are utilized in most multi-lot residential projects to control land development, architectural design,

²³⁷ 92 Haw. 374, 379-80, 992 P.2d 69, 74-75 (2000). Notably, this opinion is of no precedential value as it was ultimately withdrawn from publication. See *id.* at 374, 992 P.2d at 69.

²³⁸ *Id.* at 380, 992 P.2d at 75.

²³⁹ *Id.* at 382, 992 P.2d at 77.

²⁴⁰ *Id.* at 381-82, 992 P.2d at 76-77.

²⁴¹ *Id.* at 382, 992 P.2d at 77.

²⁴² *Id.* at 388, 992 P.2d at 83.

²⁴³ *Id.*

²⁴⁴ *Id.* at 394, 992 P.2d at 89.

²⁴⁵ *Id.*

²⁴⁶ See David L. Callies et al., *Ramapo Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 178 (2003).

landscaping, height restrictions, and other aspects of land use.²⁴⁷ Perhaps reflecting this prevalence, the Moon Court considered a number of cases relating to disputes over the application of CCRs.²⁴⁸ The court generally resolved ambiguities in favor of the free use of land.

Consistent with the precedent set in 1978 by *Collins v. Goetsch*²⁴⁹ and *Sandstrom v. Larsen*,²⁵⁰ the court continued to consider extrinsic evidence as a method to interpret ambiguous covenants in *Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd.*²⁵¹ There, JMK Associates sold a lot in Waikīkī, identified as tax map lot 48, to MNS Ltd. subject to a condition limiting the maximum building height.²⁵² The restrictive covenant, however, did not specifically name the benefited property and it was not included in the recorded deed.²⁵³ The Tom family held all of the stock in JMK and the Aina Luana Apartment-Hotel; the Aina Luana hotel owned tax map lot 269, which was adjacent to lot 48.²⁵⁴ Aina Luana subsequently sold lot 269 to Outrigger Hotels Hawai'i, the operator of the former Waikiki Malia Hotel (WMH).²⁵⁵ Outrigger later sold lot 269 to Lucky Hotels U.S.A. Co.²⁵⁶ WMH, as cross-appellant, subsequently attempted to enforce the height restriction covenant against Kinkai Properties Limited Partnership, the successor in interest to MNS.²⁵⁷

Faced with ambiguous language regarding the intent of the covenanting parties, the court evaluated extrinsic evidence of intent in order to determine that while there was a valid covenant benefiting lot 269 and burdening lot 48,²⁵⁸ at best, WMH was the beneficiary of a covenant in gross, a disfavored type of covenant in Hawai'i. The court held that WMH could not enforce the covenant against MNS and lot 48 because it had no interest in the benefitted property,

²⁴⁷ Callies, *supra* note 1, at 17.

²⁴⁸ See, e.g., *Pelosi v. Wailea Ranch Estates*, 91 Haw. 478, 985 P.2d 1045 (1999); *Hiner v. Hoffman*, 90 Haw. 188, 977 P.2d 878 (1999); *Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd.*, 75 Haw. 370, 862 P.2d 1048 (1993).

²⁴⁹ 59 Haw. 481, 488 n.3, 583 P.2d 353, 358 n.3 (1978) (comparing appellant's structure to others in the subdivision, but ultimately finding that this extrinsic evidence did not resolve the ambiguous covenant).

²⁵⁰ 59 Haw. 491, 496, 583 P.2d 971, 976 (1978) (considering the height of other structures in the subdivision, but finding that this extrinsic evidence did not prove abandonment of the height covenant).

²⁵¹ See *Waikiki Malia*, 75 Haw. 370, 862 P.2d 1048; J. David Breemer, Note, *Hiner v. Hoffman: Strict Construction of a Common Restrictive Covenant*, 22 U. HAW. L. REV. 621, 633-34 (2000).

²⁵² *Waikiki Malia*, 75 Haw. at 376-77, 862 P.2d at 1054-55.

²⁵³ *Id.* at 381 n.3, 862 P.2d at 1056 n.3.

²⁵⁴ *Id.* at 376, 862 P.2d at 1054.

²⁵⁵ *Id.* at 376 n.1, 862 P.2d at 1054 n.1.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 374-77, 862 P.2d at 1053-54.

²⁵⁸ *Id.* at 385, 862 P.2d at 1058.

but also because the facts demonstrated that there was an enforceable covenant benefitting the nearby hotel parcel, the burden of which Kinkai had already amicably resolved.²⁵⁹

In *Hiner v. Hoffman*, the court held a covenant restricting building height unenforceable due to ambiguity in its language.²⁶⁰ The dispute arose when the Hoffman family purchased a lot in the Pacific Palisades subdivision in Pearl City on the island of O‘ahu and planned to construct a three-story dwelling.²⁶¹ Each of the 119 lots in the subdivision, including that owned by the Hoffmans, were burdened by a covenant that provided: “No dwelling shall be erected, altered, placed[,] or permitted . . . which exceeds two stories in height.”²⁶² After construction began, the owners of two lots located mauka of the Hoffmans’ lot filed a complaint seeking a declaratory judgment that the Hoffmans’ house violated the restrictive covenant.²⁶³ Despite the pending litigation and warnings from neighbors and the local homeowners association, the Hoffmans completed the three-story dwelling.²⁶⁴ The circuit court granted the plaintiffs’ motion for summary judgment and issued a mandatory injunction requiring the Hoffmans to remove the third story of the dwelling.²⁶⁵

On appeal, Chief Justice Moon, writing for the majority, emphasized that the intentions of the parties to a covenant “are normally determined from the language of the deed,”²⁶⁶ but that, as in *Waikiki Malia*, “substantial doubt or ambiguity is resolved against the person seeking its enforcement.”²⁶⁷ Despite finding that “the undisputed purpose and intent of . . . [the covenant] is to restrict the height of a home built on the property”²⁶⁸ the court found the term “two stories in height” to be ambiguous on its face and vacated and remanded the case to the circuit court.²⁶⁹ In contrast to the court’s willingness to resolve the ambiguous language of the covenant in *Waikiki Malia*,²⁷⁰ the court in *Hiner* declined to resolve the ambiguity in favor of the party seeking enforcement of the covenant.²⁷¹

²⁵⁹ *Id.* at 396, 862 P.2d at 1063.

²⁶⁰ 90 Haw. 188, 189, 977 P.2d 878, 879 (1999).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 190, 977 P.2d at 880.

²⁶⁶ *Id.* (citing *Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd.*, 75 Haw. 370, 384, 862 P.2d 1048, 1057 (1993)).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 196, 977 P.2d at 886.

²⁷⁰ 75 Haw. at 385, 862 P.2d at 1058.

²⁷¹ *Hiner*, 90 Haw. at 189, 977 P.2d at 879.

Finally, in *Pelosi v. Wailea Ranch Estates*, the court considered the appropriate remedy for the violation of a restrictive covenant.²⁷² Pelosi, who owned Lot 28 of the Maui Meadows Unit III Subdivision, sought to enforce a covenant that burdened each lot in the subdivision against the parties in interest to the adjacent Lot 29.²⁷³ The subject covenant prohibited the construction of non-residential structures and limited residential structures to one-and-a-half-story residential buildings.²⁷⁴ Specifically, Pelosi sought damages and a mandatory injunction to remove the roadway and tennis court built on Lot 29 by developers who had constructed the subject improvements to service a separate subdivision, Wailea Ranch Estates.²⁷⁵ Pelosi also included subdivision lot owners as Doe defendants in the complaint.²⁷⁶ Pelosi argued that under *Sandstrom*,²⁷⁷ relative hardship to the parties was irrelevant and that an injunction was mandatory.²⁷⁸ The court held, however, that balancing the equities was appropriate because defendant lot owners had not intentionally breached the covenant.²⁷⁹ In balancing the equities, the court found that removal of the roadway would "entail a gross disproportion" between the harm to the defendants and the benefit to Pelosi.²⁸⁰ The court ultimately awarded damages and an order to remove the tennis court, but permitted the roadway to remain.²⁸¹

IX. NATIVE HAWAIIAN PROPERTY RIGHTS

In contrast to the relatively few opinions addressing Native Hawaiian rights during the Lum Court,²⁸² the Moon Court considered such rights in a number of significant cases. These cases, most notably *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)*,²⁸³ *State v. Hanapi*,²⁸⁴ and *Ka Pa'akai O Ka 'Aina v. Land Use Commission*,²⁸⁵ generally extend the scope

²⁷² 91 Haw. 478, 481, 985 P.2d 1045, 1048 (1999).

²⁷³ *Id.* at 483, 985 P.2d at 1050.

²⁷⁴ *Id.* at 482, 985 P.2d at 1049.

²⁷⁵ *Id.* at 481, 985 P.2d at 1048.

²⁷⁶ *Id.* at 483, 985 P.2d at 1050.

²⁷⁷ See *supra* note 15.

²⁷⁸ *Pelosi*, 91 Haw. at 487-88, 985 P.2d at 1055-56.

²⁷⁹ *Id.* at 488-89, 985 P.2d at 1056-57.

²⁸⁰ *Id.* at 492, 985 P.2d at 1059.

²⁸¹ *Id.* at 494, 985 P.2d at 1061.

²⁸² See Melody K. MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992).

²⁸³ 79 Haw. 425, 903 P.2d 1246 (1995).

²⁸⁴ 89 Haw. 177, 970 P.2d 485 (1998).

²⁸⁵ 94 Haw. 31, 7 P.3d 1068 (2000).

and breadth of native Hawaiian traditional and customary rights guaranteed in article XII, section 7 of the State Constitution as amended in 1978.²⁸⁶

In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (PASH)*, the court addressed several issues, including the standing of Native Hawaiians to intervene in development projects,²⁸⁷ the obligations of reviewing authorities under the CZMA, the Hawai'i State Constitution, Hawai'i common law, and the doctrine of customary rights.²⁸⁸ The case arose when Nansay Hawai'i, Inc. sought an SMA use permit from the Hawai'i County Planning Commission (HPC) to develop a resort complex.²⁸⁹ PASH, an unincorporated public interest membership organization, and Angel Pilago, a private citizen, opposed the project and requested contested case proceedings before the HPC.²⁹⁰ The HPC denied the requested contested case proceedings to both parties on standing grounds and subsequently issued the SMA use permit to Nansay.²⁹¹

The court held that Native Hawaiians who exercise customary rights within an ahupua'a have interests distinguishable from the general public that afford them standing to oppose development in that ahupua'a.²⁹² Specifically, the court found that "issues relating to the subsistence, cultural, and religious practices of [N]ative Hawaiians amount to interests that are clearly distinguishable from those of the general public[.]"²⁹³ The easing of standing requirements for Native Hawaiians arguably applies to all permits subject to contested case hearings.

Although barely raised in the briefs of the parties, the court also found that HPC must protect Native Hawaiian traditional and customary rights "to the extent [applicable] under the Hawai'i Constitution and relevant statutes"²⁹⁴ and then wrote a small treatise on the subject in a spectacular display of judicial

²⁸⁶ "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." HAW. CONST. art. XII, § 7.

²⁸⁷ 79 Haw. at 432, 434, 903 P.2d at 1253, 1255. The standing issue was the principle question before the court. *Id.*

²⁸⁸ *Id.* at 434-51, 903 P.2d at 1255-72. The court significantly expanded its review despite the paucity of treatment by the briefs.

²⁸⁹ *Id.* at 429, 903 P.2d at 1250.

²⁹⁰ *Id.*

²⁹¹ *Id.* PASH and Pilago then brought a case before the circuit court, which remanded to the HPC with instructions to hold contested case hearings. *Id.* "[T]he ICA affirmed the circuit court's order with respect to PASH[, but] reversed it with respect to Pilago." *Id.* The Hawai'i Supreme Court unanimously affirmed the ICA's decision.

²⁹² *Id.* at 434 n.15, 903 P.2d at 1255 n.15.

²⁹³ *Id.*

²⁹⁴ *Id.* at 437, 903 P.2d at 1258.

hubris. The court specifically cited article XII, section 7 of the Hawai'i State Constitution and Hawai'i Revised Statutes section 1-1.²⁹⁵ The court also incorporated the traditional and customary rights discussed in *Kalipi v. Hawaiian Trust Co.*²⁹⁶ and *Pele Defense Fund v. Paty*.²⁹⁷ The court found that "[o]ur examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i."²⁹⁸ *PASH* firmly established that reviewing agencies must protect traditional and customary rights as established by the Hawai'i Constitution, relevant statutes, and case law.

Three years after *PASH*, the Moon Court again considered traditional and customary rights in *State v. Hanapī*.²⁹⁹ and substantially retreated from some of its extreme language in *PASH*. Alapa'i Hanapī, a Native Hawaiian resident of Moloka'i, was convicted of second degree criminal trespass for attempting to halt grading on an adjacent lot that featured two fishponds.³⁰⁰ On appeal, Hanapī claimed that he had a privilege as a Native Hawaiian to remain lawfully on the subject property to engage in a constitutionally protected activity.³⁰¹ The court formulated a three-factor test to determine constitutional protection of traditional and customary rights, finding that Hanapī did not meet its requirements³⁰² that the party seeking constitutional protection must: (1) be a "[N]ative Hawaiian" as established by *PASH*, (2) "establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice[,] and (3) demonstrate that the exercise of the traditional or customary right "occurred on undeveloped or 'less than fully developed property.'" ³⁰³ The court clarified *PASH* with respect to factor three by specifying that "if property is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is always 'inconsistent' to permit the practice of traditional and customary [N]ative Hawaiian rights on such property."³⁰⁴ The three-factor test

²⁹⁵ *Id.*

²⁹⁶ 66 Haw. 1, 656 P.2d 745 (1982).

²⁹⁷ 73 Haw. 578, 837 P.2d 1247 (1992).

²⁹⁸ *PASH*, 79 Haw. at 447, 903 P.2d at 1268 (citations omitted). This "western concept" is made applicable to the states by no less an authority than the U.S. Supreme Court: "[W]e hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

²⁹⁹ 89 Haw. 177, 970 P.2d 485 (1998).

³⁰⁰ *Id.* at 178, 970 P.2d at 486.

³⁰¹ *Id.* at 182, 970 P.2d at 490.

³⁰² *Id.* at 184-85, 970 P.2d at 492-93.

³⁰³ *Id.* at 186, 970 P.2d at 494.

³⁰⁴ *Id.* at 186-87, 970 P.2d at 494-95 (emphasis omitted).

established by *Hanapi* continues to control the exercise of traditional and customary Native Hawaiian rights.

The Moon Court's third significant case dealing directly with Native Hawaiian traditional and customary rights was *Ka Pa'akai O Ka 'Aina v. Land Use Commission*.³⁰⁵ The case was a consolidated appeal arising out of the State of Hawai'i's Land Use Commission's (LUC) grant of a petition to reclassify approximately 1009 acres of land on the Big Island of Hawai'i from a conservation district to an urban district.³⁰⁶ Appellants were a number of civic associations that opposed the reclassification.³⁰⁷ In the first application of the *PASH* requirements, the court held that in making its administrative findings, the LUC failed to "protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible."³⁰⁸ The court set out the required findings related to Native Hawaiian traditional and customary rights, which structurally resemble the requirements of the National Environmental Policy Act.³⁰⁹ While the required findings specified by *Ka Pa'akai O Ka 'Aina* may aid in protecting Native Hawaiian traditional and customary rights, applying this requirement to review by the LUC is problematic. A district boundary amendment does not give rise to a developmental impact. The findings requirement would be better suited to project specific permitting review at the county level. What is clear, however, is that *Ka Pa'akai O Ka 'Aina* is consistent with the Moon court's expansion of traditional and customary Native Hawaiian rights.

X. CONCLUSION

In sum, the Moon Court has made many useful contributions to the law of property in Hawai'i. It has taken care to preserve the rights of landowners to freely use property in the face of private restrictive covenants limiting that use if such covenants are the least bit vague or poorly defined. It has amplified and extended basic principles in the areas of coastal zone management,

³⁰⁵ 94 Haw. 31, 7 P.3d 1068 (2000).

³⁰⁶ *Id.* at 34, 7 P.3d at 1071.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 53, 7 P.3d at 1090 (citing *Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n (PASH)*, 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995)).

³⁰⁹ *Id.* The requirements include

(1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary [N]ative Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary [N]ative Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect [N]ative Hawaiian rights if they are found to exist.

Id.

condominium, easement, and leasehold law. Its record on preserving private property rights guaranteed by the U.S. Constitution's Fifth and Fourteenth Amendments in the face of regulatory challenges is, on the other hand, appalling, particularly given the increasing emphasis on preserving such rights in our nation's highest court. In case after case, the Moon Court has strained to apply general and often vague goals pursued by select interest groups and factions regardless of statutory law to the contrary. The result, coupled with Hawai'i's increasingly well-known penchant for lengthy, often decade-long land use permitting processes, is a climate that increasingly discourages both local and foreign investment in land development, because it is widely perceived as too risky for the private sector to undertake. In particular, the effect on the availability of housing that is affordable at any but the most astronomical levels has been great. In short, the Moon Court has made a considerable negative impression on the land development aspect of property law, virtually converting the use of land into a privilege rather than a constitutional right subject only to regulation for the health, safety and welfare of all. Whether that impression becomes indelible is a matter that the Recktenwald Court should address at the earliest opportunity.